

## TITLE 327 WATER POLLUTION CONTROL BOARD

### #05-322 (WPCB)

#### SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On January 11, 2006, the water pollution control board (board) conducted the first public hearing/board meeting concerning the development of amendments to the rule at 327 IAC 5-4-3, 327 IAC 15-15-11, and 327 IAC 15-15-12 concerning concentrated animal feeding operations. Comments were made by the following parties:

Justin Schneider, Indiana Farm Bureau (IFB)  
Malcolm DeKryger, Pork Producer and Indiana Pork Advocacy Coalition (MD)  
Dr. Rae Schnapp, Hoosier Environmental Council (HEC)

Following is a summary of the comments received and IDEM's responses thereto.

*Comment:* Well, First of all, I'd just like to thank IDEM for what they've done on this, and we appreciate the fact that, you know, they've moved fairly quickly on this without really knowing what EPA was going to do. In fact, I think they've done an excellent job with having some foresight into what was coming. (IFB)

*Response:* IDEM is conscious of the resources that both the producers and the state will invest to accomplish the milestone dates for compliance of certain rule provisions. If the United States Environmental Protection Agency's (EPA's) rule negated the need for those provisions much resources will be conserved and both the producers and the state will have avoided investing the resources to accomplish a task not being imposed under EPA's rule changes.

*Comment:* And while Indiana Farm Bureau did make some suggestions as to substantive changes more in line with what was in the Water Keeper decision, what Nancy was calling more the middle of the rule, we understand that right now is not a good time to make those changes. So, therefore, we fully support the decision to look at just moving the time frames back. (IFB)

*Response:* This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

*Comment:* With that, a comment that we did make was that the time line for the soil conservation practice plan and for the NRCS 590 standards now apply to just a small group of CAFO's, rather than the entire group of CAFO's. It does not include new sources. In order to—for the issues of equity, fairness and the level playing field, our members believe that the time line should be extended for all CAFO operations, not just a small group. Otherwise all new sources, which were CAFO's after the rule was adopted in Indiana, will have to go ahead and have the soil conservation practice plan before the end of the time frames that have been extended. That was—IDEM has agreed in principle to this in the comments. It was the last comment that was made. They suggested that we wait until the final rule for adoption rather than this preliminary adoption. As long as it gets in here at some point, we're okay with that. I'm not sure why that we needed to wait until final adoption rather than right now. (IFB)

*Response:* IDEM agrees that this is a good suggestion and will make the suggested changes between preliminary and final adoption of this rule.

*Comment:* My name is Malcolm DeKryger. You were pretty close. I'm from De Motte, Indiana. I'm a pig farmer, pork producer from there. I'm also on the Board of the Indiana Pork Advocacy Coalition. We, as a group and individually, would like to support IDEM asking for these to be pushed back. I have both confined feeding operation, a CFO, and I have CAFO's in my operations. Because we have had no violations ever, we have applied for and received exemptions for the rules that are going on right now, so in some ways we have not had to comply because of our excellent record. However, we would certainly like to make sure that everybody is on the same page, both from a federal and a state standpoint, before we have

to jump off this diving board and into this new sea. So, therefore, as the time comes whatever [sic] the Federal Government gets all of its act together, we would certainly ask that we push this back until the time is right for the state to make its own decisions along the same lines. (MD)

*Response:* IDEM agrees it is most efficient to know what changes must be made to comply with the federal rule before investing much effort to address what may need revision in the state rule.

*Comment:* I found it interesting that some comments were asked and made by—about the fiscal impact of \$500,000. Certainly pushing the dates back for a number of months or years will not really have a big impact on our business as it is today. I can certainly assure you, and I know one of your members who is in the pig business will certainly assure you, that when the time comes, \$500,000 will be a mere drop in the bucket as to what it's going to cost us. For relatively small operations, it will be a very big burden because of the professionals that they will have to hire and pay money to, to keep them in compliance. In my particular case, I have already hired and am paying an individual to make sure that a lot of my CAFO regulations that have been handed down to us now in the last couple of years—even though I am exempt, I am complying, as we always have. But as they continue to change these rules, the amount of work and the amount of money that I'm paying is going to be adding up in a hurry. I hope that the competitiveness of our industry is not too direly affected, but that is not what this hearing is about. (MD)

*Response:* IDEM agrees that this rule has no fiscal impact for the regulated facilities.

*Comment:* I have operations in both Indiana and Illinois, and so I'm able to allocate my individual employees' expenses right now over a certain number of operations, but I would suspect that on a per-farm basis, I'm looking at not less than five to seven thousand dollars per farm. And that is on an annual basis, because just to get ready for this year doesn't mean that I've got all of my nutrient management plans ready again for the next year or the next year, because this whole thing includes cropping operations and soil testing and the changes of soils as we improve the till for the soil with our manure nutrients. It's a very dynamic situation for us, and so it's not a one-time shot. In my particular case, we designed our farms to be able to comply with federal, even in spite of the new regulations. From an equipment standpoint, I'm probably not in too bad of a shape. It's more a matter of the scientific planning and bookkeeping and paperwork and people time and testing that's going to add up. Whether it's in my CFO or my CAFO's, I'm running them the same way, because it doesn't—it just does not pay not to. Our nutrients have become a pretty expensive resource at this point. (MD)

*Response:* This rule has no fiscal impact on the regulated facilities.

*Comment:* Thank you, Mr. Chairman and members of the Board. My name is Rae Schnapp. I'm the Water Policy Director at the Hoosier Environmental Council. I'm also the Wabash River Keeper, which means that we are a member of the Water Keeper Alliance. I'm going to ask you not to preliminarily adopt this rule today, and I want to give you a little brief summary of our perspective on the Second Circuit decision. I appreciate the opportunity to present our perspective on this, and we urge you to reject the rule that's being proposed today. (HEC)

*Response:* The proposed rule change only reflects changes EPA has recently proposed during the initial efforts to comply with the Second Circuit Court Decision.

*Comment:* The Second Circuit did not eliminate EPA's authority to require NPDES permits for CAFO's. It did not clearly disagree with EPA's presumed authority to require NPDES permits on the basis of their potential to discharge. The Second Circuit clearly left open the possibility that EPA and delegated state agencies can retain their authority to regulate CAFO's on the basis of an actual discharge or a proposed discharge. All of our general permits are currently on the basis of a proposed discharge. CAFO's are generally designed to discharge under certain circumstances. They're typically designed to capture a 25-year, 24-hour storm event, and, of course, if we get a storm event that's greater than that, there—it would be an expected discharge. (HEC)

*Response:* This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

*Comment:* The Court also reaffirmed the right for states to require NPDES permits in order to address activities that cause or contribute to water quality problems. Indiana has many, many streams that are listed as impaired for E. coli [sic] or for nutrients. Clearly we have the authority to require NPDES permits to

address confined feeding discharges to those streams. Confined feeding land application areas are also confirmed sites of discharge or likely sites of discharge, and should be permanent. The Second Circuit decision definitively ruled that land application areas are point sources and that discharges from land application areas require NPDES permits unless they are found to be exempt as agricultural storm water. This clearly means that dry-weather discharges, discharges due to excessive manure application, are not covered by the exemption. The Second Circuit decision found that EPA's confined feeding regulations create an impermissible self-regulatory regime, and that it failed to meet the requirements of the Clean Water Act, because—because it fails to make the nutrient management plan part of the permit, and the nutrient management plan is really the key component of an effluent limitation for a confined feeding operation. And that was really the heart of the Water Keeper lawsuit in the first place, that the manure management plan, the nutrient management plan, is the central locus [*sic*] of our wastewater or manure application rates, and needs to be part of the permit. (HEC)

*Response:* This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

*Comment:* And a third component of the Second Circuit decision that I want to just briefly mention is that it did require effluent limitations to reduce pathogens. I have a lot of material here, but I didn't want to read it all. Unfortunately, the Second Circuit decision has been sort of put—we've put a spin on it—the industry has put a spin on it to try to justify a hands-off approach, but we think that that approach really is counter to Indiana's authority to take affirmative steps that will secure the health and integrity of our waters, and it's not an effective means to prevent water pollution from confined feeding operations. We need to address those waters that are impaired for pathogens and nutrients, and not to use this as an excuse to postpone compliance. (HEC)

*Response:* This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.